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# State v. O Respondent's Brief Dckt. 44696

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44696
Plaintiff-Respondent,	)	
	)	Ada County Case No.
v.	)	CR-2016-8747
	)	
ABDALLA PILI O, JR.,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has O failed to establish that the district court abused its discretion when, upon imposing a unified sentence of seven years, with two years fixed, for possession of heroin, it retained jurisdiction rather than placing him on probation?

O Has Failed To Establish That The District Court Abused Its Sentencing Discretion

In 2016, the state charged O with burglary, possession of heroin, possession of methamphetamine, and grand theft by possession of stolen property. (R., pp.58-59.) Pursuant to a plea agreement, O pled guilty to possession of heroin and the state dismissed the remaining charges and agreed to recommend the retained jurisdiction

program and a unified sentence of seven years, with two years fixed. (R., pp.62-69.) The district court imposed a unified sentence of seven years, with two years fixed, and retained jurisdiction. (R., pp.76-78.) O filed a notice of appeal timely from the judgment of conviction. (R., pp.73-75.)

O asserts that the district court abused its discretion by retaining jurisdiction rather than placing him on probation upon imposing his sentence, in light of his “difficult childhood,” depression, drug abuse, “on and off” employment with a fencing and moving company for “about three years,” and because he “would like to obtain his GED.” (Appellant’s brief, pp.4-6.) O has failed to establish an abuse of discretion.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” Id. (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, “[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

“Probation is a matter left to the sound discretion of the court.” I.C. § 19-2601(4). The goal of probation is to foster the probationer's rehabilitation while protecting public safety. State v. Cheatham, 159 Idaho 856, \_\_\_, 367 P.3d 251, 253 (Ct. App. 2016) (citations omitted).

The maximum prison sentence for possession of heroin is seven years. I.C. § 37-2732(c)(1). The district court imposed a unified sentence of seven years, with two years fixed, which falls well within the statutory guidelines. (R., pp.76-78.) The court also retained jurisdiction to provide O an opportunity to participate in substance abuse treatment and to obtain his GED. (R., pp.76-78; 1/19/17 Tr., p.13, Ls.16-19.) As such, it is apparent that the court took O's drug abuse and desire to complete his GED into consideration when it imposed his sentence. That O was employed “on and off” for three years did not prevent him from committing the instant offense, during which he attempted to steal from a Walmart, nor did it prevent him from committing similar offenses around the same timeframe; he committed several “burglaries of retail stores” in 2015 and 2016 and “made admissions of using drugs and using the proceeds from what he was stealing for drugs.” (1/19/17 Tr., p.7, Ls.7-10; PSI, pp.3-4, 8.) Although it is unfortunate that O – like many other members of society – had a difficult childhood and was depressed, it is noteworthy that O was 25 years old at the time that he committed the instant offense and never took it upon himself to seek counseling or other treatment for these issues. (PSI, pp.2-3, 16.) Furthermore, he failed to “participat[e] in any of the requirements of probation” in the past, thereby precluding himself from obtaining any assistance or treatment that may have been available via the probation department. (PSI, p.9.) O's probation officer recommended that the district court retain

jurisdiction and O's trial counsel likewise acknowledged, "Given [O's] skill set as it currently stands ... a rider would do him some good." (1/19/17 Tr., p.9, Ls.20-23; PSI, p.9.)

At sentencing, the district court articulated its reasons for imposing O's sentence and retaining jurisdiction rather than immediately placing O on probation. (1/19/17 Tr., p.10, L.16 – p.14, L.3.) The state submits that O has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

#### Conclusion

The state respectfully requests this Court to affirm O's conviction and sentence.

DATED this 1st day of June, 2017.

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of June, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BEN P. MCGREEVY  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

## APPENDIX A

<p style="text-align: center;">9</p> <p>1 He does have a relationship still with  2 his dad. He didn't quite finish high school, but  3 he is interested in obtaining his GED. He was  4 unfortunately homeless living in a car when this  5 particular incident occurred. He does have job  6 skills in fence building. He also believes he  7 would get back on with a company called Apex  8 Fencing once he gets out. Additional job skills  9 in moving business. He is described by apex as a  10 good employee who works hard.  11 He believes that he still suffers from  12 depression from the loss of his mom. And he has  13 been treated for that while in the Ada County  14 Jail. He does, Judge, have a lengthy history of  15 substance abuse, including not only heroin,  16 marijuana, cocaine and meth. His dad had  17 indicated as well that he believes that his  18 mother's death really amplified his drug use, and  19 I think there is some truth to that.  20 Given his skill set as it currently  21 stands, Judge, no GED, was homeless before this  22 arrest, I can't argue that it doesn't make some  23 sense that a rider would be do him some good. He,  24 however, we have discussed that, and he would  25 prefer that I ask you for a probation sentence.</p>	<p style="text-align: center;">11</p> <p>1 practical way.  2 The 2015 charges were reduced from  3 felonies to misdemeanors and petty thefts. What I  4 see happening since that time and I note and I am  5 well aware of the fact that that's designed to get  6 people a chance to pull it around if they can at  7 the lower level. What I see then is very regular  8 IV heroin-methamphetamine habit with also  9 prescription opiates being part of the mix.  10 Your father notes that you have been  11 having trouble with drug use for a while. And I  12 think that's just -- whether he said anything or  13 not, that would be pretty clear from everything  14 else that is in this report.  15 Then in March you are stopped with  16 drugs. There was a felony warrant outstanding for  17 you. At that point misdemeanors, PV warrant.  18 Then just three months less than -- three month  19 later you get picked up on this charge. And  20 again, there is methamphetamine and heroin on you.  21 Credit card belongs to somebody else. Two felony  22 warrants outstanding for that one and for the PV  23 and the one for FTA. You were stealing pretty  24 clearly. Things are going badly wrong. This  25 can't continue. This is a bad direction, unless</p>
<p style="text-align: center;">10</p> <p>1 So that's our position.  2 THE COURT: Mr. Pili O, what do you have to  3 say?  4 THE DEFENDANT: Your Honor, I want to  5 apologize to the community and the Court for my  6 actions. While I was incarcerated I really  7 thought about what I have done and I have worked  8 on changing. I just ask that if you can give me a  9 chance on probation, so I can use resources they  10 provide and better educate myself and learn skills  11 to build a better future for me and my kids.  12 Thank you.  13 THE COURT: Is there a legal cause why we  14 should not proceed?  15 MR. STEVELEY: None known, Judge.  16 THE COURT: Well, I do think that you know  17 your goal of making a better life for yourself,  18 your kids is a good goal, and I don't see you  19 moving forward in that way. In fact, what I see  20 is a pattern of a person with a pretty serious  21 drug habit, IV heroin-methamphetamine use. The  22 best work you have got has only been part-time.  23 You don't have a GED and you have been living out  24 of your car. So I don't see this moving forward  25 until a bunch of issues are dealt with in a</p>	<p style="text-align: center;">12</p> <p>1 you deal with your drug addiction, unless you  2 prove your situation, improve your situation, so  3 you can improve your education, move your  4 employability, I don't see this pattern changing  5 in any dramatic way. This is a situation where a  6 rider could, if you took advantage of it, could  7 give you some skills you need to change the  8 direction that life has been going. At 25 years  9 old to be homeless and drifting just towards worse  10 and worse drug addiction, that's not going  11 anywhere useful for you or anybody else. And I  12 don't see that pattern changing without some  13 significant resources at this time.  14 I think this is the time to do it. I  15 personally don't see any benefit in a person  16 continuing to race downhill fast. Because that's  17 what you are doing you are racing downhill fast  18 and it is not realistic that you could be of any  19 use to your children. You don't support them now.  20 There is nothing that's changed that  21 would improve that situation unless you start  22 making that addiction change and your best chance  23 for that are to participate in building your  24 skills dealing with your addiction and really  25 working seriously to change the direction that</p>

Nicole L. Julson, Official Court Reporter, Ada County, Idaho



<p style="text-align: center;">13</p> <p>1 life has gone. Because I doubt that that makes  2 you happy either, and I think it is time for you  3 go on a different direction. I think you would  4 benefit from that and society would benefit in  5 general.  6 I am going to impose a sentence of  7 two years fixed follow by five years indeterminate  8 for a seven year sentence and retain jurisdiction.  9 Now, look, there is different ways people can  10 approach those riders. The truth the rider  11 program can give a person is a lot sometimes when  12 people start thinking you are not going to do  13 anything for me. But people who work at it, start  14 seeing some different ways to handle things and do  15 things, and they start moving in a better  16 direction. If you use this time well, you can  17 finish your education, get your GED, and you can  18 deal with your drug addiction and can you start  19 making things go in a better way. Because what  20 you need to start thinking about is what kind of  21 life you want besides a life of drug addiction you  22 have been in. Because to get to a better place,  23 you are going to have to learn some better skills  24 So that's my sentence. You do have 42 days in  25 which to appeal. I am not going to deal with</p>	<p style="text-align: right;">15</p> <p>1 <u>CERTIFICATE OF REPORTER</u>  2 STATE OF IDAHO )  3 ) ss.  4 COUNTY OF ADA )  5  6 I, NICOLE L. JULSON, Official Court  7 Reporter of the County of Ada, hereby certify.  8  9 That I attended the hearing in the  10 above-entitled matter and reported in stenograph  11 the proceedings had thereat: That I thereafter,  12 from the shorthand record made by me at said  13 proceedings; that the foregoing 14 pages  14 constitutes said transcript and that said  15 transcript contains a full, true, complete and  16 correct transcript of said proceedings.  17  18 IN WITNESS WHEREOF, I have hereunto set  19 my hand this 20th day of January, 2017.  20  21  22  23  24  25</p> <p style="text-align: center;">Nicole L. Julson, CSR  Official Court Reporter  CSR No. 699  200 W Front Street  Room 2174  Boise, Idaho 83702  (208) 287-7585</p>
<p style="text-align: center;">14</p> <p>1 costs or fees at this point, restitution not at  2 this point. We will see where we are when we get  3 it back  4 (Proceedings concluded 4:04 p.m.)  5 -oooOooo-  6  7  8  9  10  11  12  13  14  15  16  17  18  19  20  21  22  23  24  25</p>	

Nicole L. Julson, Official Court Reporter, Ada County, Idaho